

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of

STANFORD SPRINGEL AS CHAPTER 11
TRUSTEE FOR THE BANKRUPTCY
ESTATE OF INNOVATIVE
COMMUNICATION CORPORATION,

Transferor and Assignor,

and

NATIONAL RURAL UTILITIES
COOPERATIVE FINANCE
CORPORATION AND ITS
SUBSIDIARIES,

Transferee and Assignees,

Application for Consent to Assign and
Transfer Control of Authority of the Assets and
Authorizations of Innovative Communications
Corporation

WC Docket No. 09-82, DA 09-1285

IB File Nos. ITC-ASG-20090519-00231,
ITC-T/C-20090519-00229, ITC-T/C-
20090519-00230

ULS File No. 0003824713 (lead application)

MB File Nos. CAR-20090526AA-09, CAR-
20090526AB-09, CAR-20090526AC-09,
CAR-20090526AD-09, CAR-20090526AE-09,
CAR-20090526AF-09, CAR-20090526AG-09

**PETITION OF ATLANTIC TELE-NETWORK, INC.
TO DENY OR, ALTERNATIVELY, TO GRANT WITH CONDITIONS**

July 7, 2009

Robert J. Aamoth
Henry T. Kelly
Joan M. Griffin
KELLEY DRYE & WARREN LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007-5108
(202) 342-8400
Attorneys for Atlantic Tele-Network, Inc.

SUMMARY

Atlantic Tele-Network, Inc. ("ATN") petitions the Commission to reject the Consolidated Applications seeking approval of the transfer of various Innovative Communication Corporation ("ICC") licenses and authorizations to the National Rural Utilities Cooperative Finance Corporation ("CFC"), or alternatively, to grant approval conditioned on CFC's divestiture of ICC's terrestrial pay-television operations ("Innovative Cable") as a fully-functioning, stand-alone business.

For over a decade ICC has held a choke-hold on the provision of fixed services in the U.S. Virgin Islands. In particular, it owns the Virgin Islands Telephone Corporation ("Vitelco"), the incumbent local exchange carrier with a 100% local telephone market share, as well as Innovative Cable, the only terrestrial pay-television operator with an estimated 90% market share. The result is that there has been, and is today, no material fixed services competition in the territory.

ICC deliberately operated Vitelco and Innovative Cable so that they did not compete with each other. In particular, Vitelco did not offer any pay-television services, and Innovative Cable did not offer any VOIP, Internet Access, data services, or other local telephone services. This strategy has denied Virgin Islanders the benefits of intermodal competition. Competition in the provision of fixed services will not occur in the U.S. Virgin Islands unless Vitelco and Innovative Cable compete against each other, and that will not occur unless they are independently owned.

In packaging the ICC assets for sale, the Chapter 11 Trustee sought to perpetuate the current arrangement whereby CFC would own 100% of both Vitelco and Innovative Cable. The Trustee did not consider the impact of this decision on competition, or the deployment of

broadband infrastructure, in the U.S. Virgin Islands. His sole objective was to maximize sale proceeds, which required him to preserve ICC's pre-existing monopoly power to the maximum extent possible regardless the impact on Virgin Islanders.

The current state of the telecommunications infrastructure in the U.S. Virgin Islands is disastrous. A PSC-appointed Hearing Examiner recently conducted a hearing on Vitelco's rates, and his findings on the state of the network are shocking. The network is a shambles that would embarrass the poorest Third World Country, and it is held together today with "scotch tape and baling wire" despite the tens of millions of dollars in annual FCC subsidies that Vitelco receives. Vitelco still operates using 1980's equipment and technology – most of which has not been maintained for years – with the result that both residential and business customers in the territory are denied access to modern services that subscribers on the U.S. Mainland take for granted. And the few services that Vitelco does provide are exorbitantly priced despite their low quality.

ICC's monopoly power in the fixed services market is impregnable. In addition to the current high level of market concentration, numerous other factors block competitive entry: (1) geographic and demographic barriers to entry are high; (2) the tiny market size and economic factors preclude entry by additional facilities-based carriers; (3) Vitelco's FCC subsidies and local tax benefits give it a prohibitive cost advantage over competitors; (4) Vitelco is not subject to the market-opening requirements in section 251(c) of the Communications Act; and (5) there is insufficient funding to ensure vigorous and fair PSC regulatory actions.

Surprisingly, the Consolidated Applications are completely silent as to the horrific chain of events that forced ICC into bankruptcy. As the Trustee knows well, ICC's former Chairman extracted approximately \$60 million from ICC and its operating companies, including Vitelco, for personal uses, and reportedly still owes \$156 million to ICC. Vitelco itself has referred to

these actions as the “looting” or “plundering” of ICC. As funds came into Vitelco, they were “upstreamed” to ICC so that its Chairman could have easier access to them. Apart from raising serious questions whether FCC subsidies were misappropriated, this sorry chapter in Vitelco’s long record of abusive operations removes any possible doubt that perpetuating the common ownership of Vitelco and Innovative Cable – and thereby eliminating any real intermodal competition in the U.S. Virgin Islands – will ensure that Virgin Islanders are not likely to join the broadband age any time soon. If competition could not emerge when the pre-existing monopolist was being run into the ground by mismanagement and avarice, it is difficult to imagine any realistic scenario where competition will emerge in the future while Vitelco and Innovative Cable are under common ownership.

The Commission’s authority to impose a divestiture condition to ensure that the transaction under review promotes the public interest is well-established. Further, the divestiture of Innovative Cable fully complies with the Commission’s practice of adopting only transaction-specific conditions. In this case, the transaction under review is not merely the selection of CFC as the winning bidder, but the Trustee’s packaging of the assets for sale and the auction process itself. The Trustee made several decisions with enormous consequences for Commission (and U.S. Government) policies regarding competition and the deployment of broadband infrastructure in rural areas. The Commission can and should fully assess those consequences in its application of the public interest standard in this proceeding.

This is a unique opportunity for the Commission to establish competition, and promote the deployment of broadband infrastructure, in an underserved rural area. This opportunity may not come again for years if at all. ATN urges the Commission to take the actions necessary to preserve and promote its most important policies.

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**PETITION OF ATLANTIC TELE-NETWORK, INC.
TO DENY OR, ALTERNATIVELY, TO GRANT WITH CONDITIONS**

Atlantic Tele-Network, Inc. ("ATN"), by its attorneys, hereby petitions the Commission to deny the above-captioned applications [hereinafter "Consolidated Applications"] of Stanford Springel as Chapter 11 Trustee for the Bankruptcy Estate of Innovative Communication Corporation ("Mr. Springel" or "Trustee"); Innovative Communication Corporation, acting by and through its Chapter 11 bankruptcy trustee ("New ICC"); National Rural Utilities Cooperative Finance Corporation ("CFC"); DTR Holdings, LLC; VI PowerNet, LLC ("VI PowerNet"); Vitelcom Cellular, Inc.; New ICC's Innovative Business Systems Division; Innovative Long Distance, Inc. ("Innovative Long Distance"); Virgin Islands

Telephone Corporation d/b/a Innovative Telephone (“Vitelco”); Caribbean Communications Corporation; St. Croix Cable TV, Inc.; and Atlantic Aircraft, Inc. (collectively the “Applicants”) or, alternatively, to grant the Consolidated Applications on the condition that CFC fully divests all cable television operations in the U.S. Virgin Islands, including Caribbean Communications Corporation and St. Croix TV, Inc. (hereinafter individually and collectively “Innovative Cable”). The divestiture should be structured in such a way that Innovative Cable is capable of operating and competing effectively on a stand-alone basis from the outset.¹

The context and role of the proposed new owner is critical to the FCC’s analysis of the Consolidated Applications. The Applicants note that the proposed new owner of these ICC assets, CFC, is affiliated with the Rural Telephone Finance Cooperative (“RTFC”), which loaned ICC more than US\$500 million from 1987 through 2001.² ATN understands that the ICC loans were RTFC’s largest extension of credit to any single debtor, by a substantial amount. While the ostensible purpose of RTFC loans was to promote infrastructure deployment in rural areas, the RTFC did not follow through to see that ICC used the funds responsibly for that purpose, or even that the loans were used for domestic U.S. purposes, and in fact, as best can be ascertained the loaned funds were not used in accordance with RTFC’s mission. In general, RTFC was inattentive if not negligent in that it failed to monitor ICC’s activities during the time period when the ICC Chairman’s misappropriation of many tens of millions of dollars eventually pushed ICC into bankruptcy. As the Trustee discovered, the ICC assets are not remotely sufficient to repay ICC’s outstanding obligations, including the RTFC loans, thereby effectively forcing RTFC, which has essentially no experience as an operator of telecommunications

¹ ATN would support permitting CFC to have the choice of divesting Vitelco rather than Innovative Cable as an alternative means of achieving separate ownership.

² Consolidated Applications, Exhibit 1 at ii.

companies, into the awkward and undesirable position of having to take over and operate the ICC assets in order to salvage what it can from the loans and hopefully prepare the companies for yet another sale to a more competent operator down the road, when market conditions are more favorable.

I. INTRODUCTION

Through its wholly-owned subsidiary Choice Communications, LLC (“Choice”), ATN has provided communications services in the U.S. Virgin Islands for over ten years. Choice currently provides wireless data services to residential and business subscribers in the territory. Choice also provides paging and SMR services. Choice does not provide any voice services in the U.S. Virgin Islands at this time. Choice provided multi-channel video services in the territory until it exited that business on May 31, 2009.³ ATN was a participant in the auction process conducted by Mr. Springel at the end of 2008 for the sale of New ICC’s so-called Group One assets, including, among others, Innovative Cable; Vitelco; Innovative Long Distance; and VI PowerNet.⁴ As a sophisticated investor, ATN took into account when evaluating this

³ The attached Declaration of Mr. David Haddow, the President and Chief Executive Officer of Choice, provides evidentiary support for ATN’s interest in this proceeding [hereinafter “*Haddow Declaration*”]. The *Haddow Declaration* is provided in Attachment A.

⁴ ATN is a telecommunications company headquartered in Salem, Massachusetts. ATN’s principal subsidiaries include: Commnet Wireless, LLC, which provides voice and data wireless roaming services in rural areas in the United States; Guyana Telephone & Telegraph Co. Ltd, which is the national telephone service provider for local, long distance and international voice and data services as well as a retail mobile service provider in Guyana; Bermuda Digital Communications Ltd., which is a wireless retail voice and data provider in Bermuda as well as an early-stage wireless provider in Turks & Caicos; and Sovernet, Inc., which provides wireline voice and data services to business and residential subscribers in New England and high-capacity transport services through its subsidiary ION Holdco LLC in New York. As an historical note, ATN owned and operated Vitelco from 1986 until 1997, when Mr. Jeffrey Prosser became the sole ultimate owner.

opportunity the possibility that the Commission or the U.S. Virgin Islands Public Service Commission (“PSC”) would require that certain assets be divested.

The fixed communications services market in the U.S. Virgin Islands is a competitive wasteland. A single company – ICC – controls the incumbent local exchange carrier, the only (and dominant) terrestrial multichannel video operator, the largest ISP, and the largest long distance provider, among other assets. As a consequence of this market dominance and despite efforts by Choice and others over many years, there is essentially no competition in the provision of fixed communications services in the territory today. Nor is it likely that any material competition will develop in the future. Virgin Islanders have been denied the benefits of the broadband age that enables telephone companies to compete with cable companies throughout the United States, and will continue to be denied those benefits until there is a structural change in the market that will promote such competition. They pay high prices for poor services over a landline network that is, by Vitelco’s own admission, a complete shambles. No true wired broadband infrastructure has been constructed in the territory, and the take-up of “broadband” services in the territory (mostly bandwidth-limited DSL and dial-up Internet access) is far below the U.S. Mainland.

To date, ICC has operated Vitelco and Innovative Cable so that they do not compete against each other. Vitelco does not offer any video services, and Innovative Cable does not offer any voice or data communications services. As a result, in the U.S. Virgin Islands market there is no cable modem service, no voice over cable, no widespread availability of DSL, no video on demand, and no multichannel video provider that offers effective competition to Innovative cable TV. In a market such as the U.S. Virgin Islands, dominated by one provider, competition between the ILEC and the cable television operator presents the only realistic

alternative for true, widespread facilities-based competition to finally emerge. ICC's common ownership of Vitelco and Innovative Cable has thwarted such competition, thereby denying Virgin Islanders the benefits of intermodal competition. The result has been that infrastructure investment – despite many tens of millions in annual FCC subsidies – has been virtually non-existent and the current network remains a creature of 1980's technology. The Hearing Examiner tasked with evaluating the state of Vitelco's network during the PSC's 2008 investigation of Vitelco's rates⁵ found that Vitelco's network is held together by “scotch tape and baling wire” and concluded that most Third World countries have a better telecommunications network than the U.S. Virgin Islands.⁶

One of the Trustee's jobs in the bankruptcy proceeding was to decide how to sell the ICC assets. The Trustee might have chosen to sell Vitelco and Innovative Cable separately. However, the Trustee's objective was not to promote competition or spur the build-out of broadband infrastructure in the territory. Rather, the Trustee's objective was to sell the assets for “maximum profits.”⁷ A Managing Director of the investment bank assisting the Trustee testified before the PSC that it is the “Trustee's duty under the Bankruptcy Code to maximize the value of the ICC bankruptcy estate assets.”⁸ In this case, maximizing the value of the assets required the Trustee to preserve ICC's current monopoly in the fixed services market in the U.S. Virgin

⁵ *In re Investigation of Rates of Virgin Islands Telephone Corporation d/b/a Innovative Telephone*, PSC Docket No. 578 [hereinafter “*2008 Vitelco Rate Investigation*”].

⁶ See Regular Meeting of the U.S. Virgin Islands Public Services Commission, Dec. 8, 2008, Transcript at 16, 19 (Comments of Hearing Examiner David Nissman summarizing evidence presented by Vitelco regarding the Vitelco network in the *2008 Vitelco Rate Investigation*) [hereinafter “*Hearing Examiner Testimony*”].

⁷ See “ICC trustee meets with PSC to outline position and expectations for Vitelco,” The Virgin Islands Daily News, Nov. 20, 2007 (quoting the Trustee as identifying his primary role to be getting the companies in shape “so that they can be sold for maximum profits”).

⁸ See Pre-filed Rebuttal Testimony of Adam Dunayer, *2008 Vitelco Rate Investigation*, Oct. 31, 2008, at 10.

Islands, so the Trustee packaged all of these assets together in the so-called Group One assets. In effect, the Trustee sought to preserve the status quo in the territory – one in which there is no fixed services competition and certainly no inter-modal competition between the ILEC and the cable television operator – in order to maximize the purchase price for the consolidated assets. To be clear, ATN does not intend by filing this Petition to criticize the actions of the Trustee, who was merely attempting to fulfill his role in the bankruptcy process. Rather, ATN's objective is to identify the serious telecommunications policy implications of the proposed transaction so that the Commission can fulfill its statutory duty to act in the manner that best promotes the public interest. In passing, ATN would note that it is far from clear that the Trustee accomplished his intended objective since the assets were awarded to CFC as a credit bidder.

The question for the Commission is whether it promotes the public interest to preserve the status quo in the U.S. Virgin Islands whereby Vitelco and Innovative Cable do not compete with each other. ATN submits that it does not. The Commission has a unique opportunity to establish competition in the U.S. Virgin Islands for the first time ever. It is not clear when this opportunity will come again. If the Commission passes on this opportunity, it will condemn Virgin Islanders to more of the same – high prices, bad service, under-investment, and a paucity of advanced communications services. Without head-to-head competition between Vitelco and Innovative Cable, investment in true broadband infrastructure will be limited and perhaps non-existent for years to come.

This proceeding is especially timely as it comes on the heels of a particularly vicious cycle of exploitation by the previous owner and management of ICC, which ultimately forced ICC into bankruptcy and left the territory with a barely-functioning landline network. As the Trustee knows well, ICC's former Chairman extracted approximately \$60 million from ICC

and its operating companies, including Vitelco, for personal uses, and he reportedly still owes \$156 million to ICC. During the *2008 Vitelco Rate Investigation*, Vitelco itself referred to the former Chairman's conduct as the "looting" or "plundering" of Vitelco.⁹ The ICC scandal not only raises serious questions as to whether FCC subsidies were misappropriated, it demonstrates the choke-hold that ICC has over the fixed communications market sector in the territory. If competition could not emerge when the pre-existing monopoly provider was being run into the ground by mismanagement, avarice, and a lack of effective oversight by its lender and local regulatory authorities, it is difficult to imagine any realistic scenario where competition will emerge in the future if Vitelco and Innovative Cable are under common ownership.

II. THE STANDARD OF REVIEW

The Commission may not approve the Consolidated Applications unless the Applicants meet their burden to show by a preponderance of evidence that transferring ownership of the Group One properties to CFC is consistent with the Communications Act of 1934, as amended (the "Act") and the Commission's regulations,¹⁰ and that it promotes the "public interest, convenience and necessity."¹¹ In this context, the Commission has previously said it will view public interest standard broadly, not narrowly.¹² In particular, the Commission

⁹ See *Hearing Examiner Testimony*, Tr. at 57.

¹⁰ *Applications Filed for the Transfer of Control of Embarq Corp. to CenturyTel, Inc.*, WC Docket No. 08-238, Memorandum Opinion and Order, FCC 09-54, rel. June 25, 2009 at ¶ 9 [hereinafter "*Embarq/CenturyTel Order*"].

¹¹ *Id.*; see 47 U.S.C. §§ 214(a), 310(d).

¹² See *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12365-12366 (2008); *Rainbow DBS Company LLC and Echostar Satellite L.L.C., Consolidated Application for consent to Assignment of Space Station and Earth Station Licenses, and related Special Temporary Authorization*, Memorandum Opinion and Order, 20 FCC Rcd 16868, 16873-16874 (2005); *Application of WorldCom, Inc. and MCI Communications Corp. for the Transfer of Control of MCI*

must determine whether the transfer of the assets is in the best interests of the “public,” not merely, as the Trustee has determined, whether the sale is in the best interests of ICC’s creditors. As the Commission has noted, “the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.”¹³ Then the Commission employs a “balancing test” to weigh the public interest harms against the putative benefits of the proposed transactions.¹⁴

In recent orders, the Commission has identified numerous relevant public interest factors, including “a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.”¹⁵ With respect to competition, the Commission has clearly articulated that the proposed transaction must “enhance, rather than merely preserve, existing competition.”¹⁶ The Commission also has shown sensitivity to the unique needs of consumers in rural areas, and it has carefully evaluated whether proposed transactions will make the lives of rural subscribers better or worse. In

Communications Corp. to WorldCom, Inc., Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 112 (1998) [hereinafter “*WorldCom/MCI Order*”].

¹³ *Embarq/CenturyTel Order* at ¶ 9.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 10.

¹⁶ See *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶ 28 (2008) [hereinafter “*Verizon Wireless/ALLTEL Order*”]; see also *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and Petitions for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 12463, 12479 ¶32 (2008) [hereinafter “*Verizon Wireless/RCC Order*”]; *Sprint Nextel Corp. and Clearwire Corp., Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Opinion and Order, 23 FCC Rcd 17570, ¶ 21 (2008) [hereinafter “*Sprint/Clearwire Order*”].

particular, the Commission has recognized that rural areas often present far fewer opportunities for true competitive entry than urban areas,¹⁷ and that transactions should promote the development of true broadband infrastructure and applications at affordable prices for consumers in rural America.¹⁸

The Commission has recognized that it has the authority to impose conditions designed to ensure that the transaction promotes the public interest. In many cases, the Commission has ordered the parties to divest certain assets as a condition of its approval of the transaction.¹⁹ The Commission has authority under section 303(r) to prescribe restrictions or conditions not inconsistent with law to carry out the provisions of the Act.²⁰ Similarly, section 214(c) authorizes the Commission to impose conditions that in its judgment will promote the public convenience and necessity.²¹

In this case, the public interest in fixed services competition in the U.S. Virgin Islands, as well as the creation of true market-based incentives for parties to build broadband infrastructure and offer advanced services, requires that the Commission condition its approval of the Consolidated Applications upon CFC's agreement to fully divest Innovative Cable as a fully-functioning, stand-alone business. It should be noted that this condition is consistent with

¹⁷ See *Embarq/CenturyTel Order* at ¶ 18.

¹⁸ See *Id.* at ¶ 2; *Facilitating the Provision of Spectrum-based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, 19139-19142 (2000).

¹⁹ See, e.g., *Verizon Wireless/RCC Order* at ¶ 113; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 4 (2002); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 9816, ¶ 4 (2000); *WorldCom/MCI Order* at ¶¶ 151-152.

²⁰ 47 U.S.C. § 303(r).

²¹ 47 U.S.C. § 214(c).

Congress' and the Commission's recognition in section 652 of the Act that common ownership of local exchange carriers and cable systems serving the same area is generally antithetical to the public interest.²² Regardless whether section 652 is violated by the proposed transaction, this underlying policy can and should instruct the Commission's implementation of the public interest standard. In this case, it requires the Commission to take whatever actions are necessary to ensure separate ownership of Vitelco and Innovative Cable so that Virgin Islanders, for the first time ever, will benefit from true inter-modal competition.

III. THE TRANSACTION

The entity dubbed "New ICC" is the parent corporation of a number of wholly-owned subsidiaries that have licenses and other regulatory authority issued by the Commission. As it went into bankruptcy, New ICC owned the stock of myriad operating entities providing regulated and non-regulated services in Denmark, France, the U.S. Virgin Islands and several other Caribbean countries. The operating subsidiaries included, among others, Vitelco, the exclusive provider of local wireline telephone services in the U.S. Virgin Islands, and Innovative Cable, the only terrestrial pay-television operator in the territory, as well as wireless companies on both the Dutch and French sides of St. Martin, cable TV companies in Martinique, the newspaper operations in the U.S. Virgin Islands, and a variety of intermediate holding companies operating under the laws of Denmark, France, and the Netherlands Antilles.²³ While the transfer of control of these inter-woven entities is undoubtedly complicated, neither the Trustee nor the Applicants have attempted to analyze whether the Trustee's decision to package these assets into

²² 47 U.S.C. § 652.

²³ *In re Innovative Communications Corp.*, Case No. 07-30012, Dist. Ct. of V.I., Bankr. Division, Order Approving Sale Procedures at 4-5, Feb. 1, 2008 (Doc. No. 443) [hereinafter "*Innovative Bankruptcy*"].

several different “Groups” for sale is in the public interest. For purposes of the Commission’s application of the public interest standard, the Commission must examine both the Trustee’s decision as to how these assets should be packaged for sale as well as the selection of the entity to purchase the so-called Group One assets.

In the bankruptcy proceeding, the Trustee proposed to divide all of the operating entities into primarily three groups:

Group 1 – Telecom and Non-French Cable Operations. These companies include Innovative Long Distance, Innovative Business Systems, VI PowerNet (the U.S. Virgin Islands Internet Service Provider), St. Croix Cable TV, British Virgin Islands Cable TV, U.S. Virgin Islands Cable TV, St. Maarten Cable TV, ICC TV2 (a cable television station in the USVI), St. Martin Mobiles and Eastern Caribbean Cellular (a cellular provider in St. Martin).

Group 2 – French Cable Operations. These companies include Valvision (a cable provider in France), World Satellite Guadeloupe (the cable provider in Guadeloupe), Martinique TV Cable, and several other intermediate holding companies.

Group 3 – Media Operations. This included the Daily News Publishing Co., the publisher of the Virgin Islands Daily News.

In its Motion seeking approval from the Bankruptcy Court to approve the sale of these companies, the Trustee provided no explanation, rationale or justification for dividing these various operating entities among these three groups. At no time did the Trustee indicate that he had even considered the impact of this grouping on competition in the U.S. Virgin Islands or the deployment of broadband infrastructure in the territory. The Trustee sought approval from the Bankruptcy Court to sell the estate assets, without ever justifying his decision to include Vitelco and Innovative Cable in the same group. The extent of the Trustee’s explanation for grouping the assets in this manner was “after evaluating various means of reorganization, and soliciting the input of the RTFC and the Greenlight Entities, the Trustee has determined in his business

judgment that the Sale of the Primary Assets will maximize the value of the estate and will be in the best interests of the creditors.”²⁴

The Consolidated Applications also offer no rationale for grouping the cable operations with the local wireline and wireless assets. The Applicants claim that the transaction is in the public interest,²⁵ but offer no verifiable information to support these claims, and only four pages of boilerplate language of how things will be better once the operating entities emerge out from under the bankruptcy cloud. The Consolidated Applications opine that the proposed transaction “will serve the public interest by ensuring continuity of service by the principal providers of telecommunications and cable television services in the U.S. Virgin Islands, including the incumbent local exchange carrier, Vitelco.”²⁶ However, there is no explanation for why this particular grouping would ensure continuity of service, or otherwise promote the public interest, better than other possible groupings. Even if the wireline operations are owned separately from the cable operations, there is no reason to believe that the continuity of service would be disrupted in any way. Certainly, the Applicants offer no justification for perpetuating the common ownership of Vitelco and Innovative Cable, which has had such disastrous results over a decade for the people of the U.S. Virgin Islands.

The Consolidated Applications also claim that “New ICC and its operating subsidiaries have ‘limited capital’ and ‘substantial indebtedness,’” without disclosing or

²⁴ *Innovative Bankruptcy*, Motion for Order (A) Approving Sale of all of the Debtor’s Primary Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Granting Related Relief (the “Sale Motion”), at 9 (Doc. No. 360). The “Greenlight Entities” are judgment creditors of New ICC and include Capital Qualified, L.P., Greenlight Capital, L.P., and Greenlight Capital Offshore, Ltd. *See Innovative Bankruptcy*, Complaint by Stan Springel against Dawn Prosser, Adv. case 3:07-ap-03012, Feb. 8, 2008 (Doc. No. 444).

²⁵ Consolidated Applications, Exhibit 1 at 15-20.

²⁶ Consolidated Applications, Exhibit 1 at iv.

discussing the fact the lion's share of this indebtedness, which is owed to the proposed transferee, will be extinguished through its credit bid in the bankruptcy proceeding.²⁷ The Consolidated Applications claim that "CFC is committed to reviewing operational responses to disasters and taking operational steps needed to minimize customer disruption and network restoration costs after future disasters."²⁸ However, this non-binding "commitment" presumably could be offered up even were Vitelco and Innovative Cable to be under separate ownership.²⁹

The Consolidated Applications contend that the grouping of the operating entities in the manner proposed by the Trustee "will enhance competition in the provision of wire line, mobile, and MVPD services" because CFC is neither a carrier nor a provider of multichannel video programming.³⁰ With all due respect, that statement makes no sense. If anything, it casts doubt upon whether CFC is even a qualified purchaser since it has no experience operating these types of businesses, and its parent company failed to engage in satisfactory monitoring of ICC's activities despite an outstanding loan of US\$500 million. It speaks volumes about the absence of public interest benefits for this transaction when the Applicants are effectively urging the Commission to treat their lack of experience in the business as beneficial. Rather than touting their capabilities and demonstrated expertise in running the ICC properties, especially in this difficult situation where ICC was "looted" by its previous Chairman and its network lays in ruins, the best CFC can offer is that they have no relevant experience at all. In any event, ATN

²⁷ Consolidated Applications, Exhibit 1 at 16.

²⁸ Consolidated Applications, Exhibit 1 at 16.

²⁹ Indeed, in an area prone to hurricanes, it has been Choice's experience that rapid recovery from a disaster is better served by separate entities operating separate systems. Recently, St. Croix was hit by Hurricane Omar, after which Choice, which had minimal disruption of its system, resumed operations of its wireless broadband system and then-existing multichannel television service within hours of the storm passing. Innovative voice and video services were unavailable for days and, in some areas, weeks.

³⁰ Consolidated Applications, Exhibit 1 at 19.

does not understand how a new owner's lack of experience will "enhance" competition in a market which historically has had none.

Certainly, the fact that the name on the "New ICC" door changes while ICC's highly-concentrated monopoly operations providing landline telecommunications services, pay-television services, and other services continue as before -- in the hands of a single owner -- will not enhance competition. The reality is that these assets were packaged in the same group precisely to avoid creating more competition, thereby increasing the perceived value of the assets. In an effort to maximize the money received for these assets, the Trustee combined businesses that are likely to yield monopoly rents for the new owner, and requests that its application be granted without providing any conditions on the new owner, or offering binding commitments to the Commission, to deploy facilities, repair the dilapidated Vitelco network or in any way promote a competitive environment. The question for the Commission is whether it will accept this opportunity to create a structure that serves to promote the public interest in robust competition or whether it will, without review, accept certain decisions by the Trustee (and the transferee) that have dramatic consequences for competition and broadband deployment in the U.S. Virgin Islands.

IV. THE DEMISE OF ICC AND ITS IMPACT ON THE U.S. VIRGIN ISLANDS

When the definitive book is finally written on the excesses, greed, self-dealing and outright fraud that characterized certain portions of the U.S. financial and business community over the past ten years, the story of ICC, and its Chairman, Mr. Jeffrey Prosser, may have its own chapter. Interestingly, the Applicants do not discuss, or even mention, the multi-

year period during which Mr. Prosser used ICC as his “own personal piggy-bank”³¹ with catastrophic consequences for Vitelco and the citizens of the U.S. Virgin Islands – a company with negative working capital; years without any infrastructure investment or maintenance despite massive FCC subsidies; millions of dollars in unfunded pension liabilities; a landline network that by ICC’s own admission is an utter shambles; the ongoing use of 1980’s technology and equipment; the absence of broadband infrastructure or any IP-based services; and so on. The Applicants and the proposed transferee would like to sweep the ICC scandal under the rug because they know that the FCC approvals they request will, and indeed are intended to, perpetuate the high levels of market concentration that helped cause the melt-down leading to ICC’s bankruptcy.

A. The Looting of ICC.³²

For a small, insular community the size of the U.S. Virgin Islands (population = roughly 108,000), the size of the ICC scandal is Madoff-esque. During his tenure as ICC Chairman, and with assistance from ICC employees, Mr. Prosser siphoned an estimated US\$60 million from ICC and its operating companies, including Vitelco, for the personal use of himself and his family.³³ These funds were spent on multiple residences, paintings, other fine art, jewelry, wine, private jets, luxury cars, sports boxes, insurance premiums, tuition, antique

³¹ *Innovative Bankruptcy*, Complaint by Stan Springel against Jeffrey J. Prosser, et al. at 4, Adv. case 3:07-ap-03010, Oct. 19, 2007 (Doc. No. 169).

³² Mr. Prosser’s extraction of funds from ICC and its subsidiaries for personal use has often been characterized within the U.S. Virgin Islands as the “looting” of ICC. *See, e.g., 2008 Vitelco Rate Investigation*, Memorandum Opinion and Order of David Nissman, Hearing Examiner, Dec. 1, 2008, at 42 [hereinafter “*Hearing Examiner Report*”]. A copy of the *Hearing Examiner Report* (including the Hearing Examiner Findings of Fact) is provided in Attachment B.

³³ *See* “ICC trustee pursuing repayment of \$60 million spent on non-business goods for Prosser’s family,” *The Virgin Islands Daily News*, Feb. 12, 2008; *Innovative Bankruptcy*, Complaint by Stan Springel against Dawn Prosser, at 5, Adv. case 3:07-ap-03012, Feb. 8, 2008 (Doc. No. 444).

furniture, and various other non-ICC related expenses.³⁴ It has been reported that Mr. Prosser owes US\$156 million to ICC for funds he borrowed or extracted from ICC and its operating companies for his personal use.³⁵ This extraction of assets occurred over several years without detection by the PSC. Nor did the RTFC uncover any of these activities despite having loaned US\$500 million to ICC and Mr. Prosser.

B. The Impact on Vitelco.

This massive misappropriation of corporate funds wreaked havoc on Vitelco's network and services. During the *2008 Vitelco Rate Investigation*, the Hearing Examiner received evidence and made numerous findings. Citing "Vitelco's long history of active neglect" and the "abysmal record" of Vitelco's management team, which "ran Vitelco's network into the ground,"³⁶ the Hearing Examiner concluded that Vitelco "ignore[ed] its network which has essentially stopped the production of new and improved products and services to Virgin Islanders" and that "Vitelco's technology is for the most part stuck in the 1980s."³⁷ The Hearing Examiner blamed not only Mr. Prosser, but the Vitelco management team, which he believes actively participated in the inappropriate diversion of Vitelco's liquid assets to non-business related uses.³⁸ The Hearing Examiner even went so far as to conclude that "the actions and conduct of the prior management (and ownership) of Vitelco clearly demonstrate violations of

³⁴ See "ICC Funds Spent on Prosser's Family Include Tuition and Rent in Paris," The Source, Nov. 17, 2008; "ICC Trustee pursuing repayment of \$60 million spent on non-business goods for Prosser's family," The Virgin Islands Daily News, Feb. 12, 2008; "Judge orders Prosser to inventory and safeguard millions in luxury items," The Virgin Islands Daily News, Nov. 3, 2007; *Innovative Bankruptcy*, Complaint by Stan Springel against Jeffrey J. Prosser, et al. at 2, Adv. case 3:07-ap-03010, Oct. 19, 2007 (Doc. No. 169).

³⁵ See "Court Documents: Prosser Owes ICC More than \$156 Million," The Source, Nov. 21, 2008.

³⁶ See *Hearing Examiner Report* at 49.

³⁷ *Id.* at 44, 53.

³⁸ *Id.* at 61.

their respective fiduciary duties and obligations to Vitelco as a company.”³⁹ This has been just another chapter in “the history of abuse this telephone company has heaped on its ratepayers.”⁴⁰

The evidence of the current state of disrepair of Vitelco’s landline network was shocking. Vitelco itself put forward Mr. Keith Milner as an expert witness. Mr. Milner concluded that the network is “seriously outdated,”⁴¹ in a “state of significant disrepair,”⁴² and subject to a “pervasive level of deterioration.”⁴³ Mr. Milner concluded that two-thirds of Vitelco’s network should be classified as in “poor” condition, which reflects the “generally deteriorated and outdated state of the network observed.”⁴⁴ He noted that Vitelco’s switching software is eight generations out of date and hence no longer supported by the manufacturer.⁴⁵ Some of Vitelco’s aerial wires are strung on trees rather than poles, while others are just left lying unprotected on the open ground.⁴⁶ Based on Mr. Milner’s testimony, the Hearing Examiner informed the PSC that “[the network] hasn’t been touched since the 1980s. . . . They didn’t do any maintenance on the system.”⁴⁷

Of course, the losers when the landline network deteriorates to this extent are residential and business users in the U.S. Virgin Islands who are denied services that are

³⁹ *Id.*

⁴⁰ *Id.* at 60-61.

⁴¹ See Direct Testimony of W. Keith Milner, *2008 Vitelco Rate Investigation*, Sept. 26, 2008 at 4, 11 (testimony presented by Vitelco) [hereinafter “*Milner Testimony*”]. A copy of the *Milner Testimony* is provided as Attachment C. Mr. Milner noted that “newer technology that is common in almost every telecommunications network on the mainland is virtually absent from Vitelco’s network.” *Id.* at 4-5.

⁴² *Id.* at 11.

⁴³ *Id.* at 5.

⁴⁴ *Id.* at 21. Mr. Milner explained that a “poor” rating means that the equipment has a “serious service-impacting damage, defect or deterioration.” *Id.* at 9.

⁴⁵ *Id.* at 12.

⁴⁶ *Id.* at 19.

⁴⁷ *Hearing Examiner Testimony*, Tr. at 56.

commonly available on the U.S. Mainland. In particular, Vitelco can offer a maximum download speed of only 1 MBPS for DSL service and 1.544 MBPS (DS-1) for data services.⁴⁸ Vitelco does not offer any Internet Protocol (“IP”)-based services, PRI services, Ethernet services, optical ring services, packet switching services, video services, conferencing services, virtual private network services, or remote access services.⁴⁹

Vitelco also presented expert testimony from Dr. Jeffrey Eisenach, who concluded that Vitelco’s landline network is “far below standard when compared to the mainland United States.”⁵⁰ In particular, Dr. Eisenach concluded that “the availability and usage of advanced services in the USVI, such as broadband Internet access, is also far below par.”⁵¹ With regard to service quality, Dr. Eisenach examined Vitelco’s data on repair time duration, installation intervals, and customer complaints in concluding that “telephone service quality levels in the USVI are substantially below those in the mainland United States.”⁵² Based on FCC data, Dr. Eisenach estimated that “only 36 percent of USVI households subscriber to residential broadband service, as compared with 62 percent of households in the United States.”⁵³ He attributes this 28% gap to “the inability of Vitelco’s current infrastructure to support advanced services.” And Vitelco’s few broadband offerings are “substantially less capable and more expensive” than those on the U.S. Mainland.⁵⁴ The cost of Vitelco’s network neglect on the USVI economy is staggering – Dr. Eisenach estimates that even a 7% increase in

⁴⁸ *Id.* at 25.

⁴⁹ *Id.* at 26-33.

⁵⁰ See Direct Testimony of Dr. Jeffrey A. Eisenach, *2008 Vitelco Rate Investigation*, Sept. 26, 2008, at 3 (testimony presented by Vitelco) [hereinafter “*Eisenach Testimony*”]. A copy of the *Eisenach Testimony* is provided as Attachment D.

⁵¹ *Id.*

⁵² *Id.* at 5-10.

⁵³ *Id.* at 10-11.

⁵⁴ *Id.* at 12.

the broadband adoption rate would yield up to \$41 million annually in economic benefits and 840 new jobs.⁵⁵ As Dr. Eisenach noted, “[t]he relationship between broadband deployment and use, on the one hand, and economic growth, on the other, is well documented.”⁵⁶

Based on Vitelco’s own testimony, it is now clear that Vitelco has neither invested in infrastructure nor engaged in routine maintenance of its network for a period of many years. The Trustee was not exaggerating when he concluded that Vitelco is characterized today by “dysfunctional operations.”⁵⁷

C. FCC Subsidies.

Vitelco received enormous ongoing federal subsidies under the FCC’s High-Cost Fund during the period when ICC was being looted. The USAC website shows that the following payments have been made to Vitelco from 2003 to the present:

2003:	\$30,174,885
2004:	\$21,652,518
2005:	\$22,617,908
2006:	\$25,250,244
2007:	\$25,684,859
2008:	\$19,736,700
2009:	\$6,852,591 (five months) ⁵⁸

What were these Federal funds used for? Given the evidence that Vitelco’s network is being held together by “scotch tape and baling wire,”⁵⁹ it seems clear that they were not used to build or maintain Vitelco’s landline network. It is difficult to imagine that some portion of these

⁵⁵ *Id.* at 4, 21.

⁵⁶ *Id.* at 18.

⁵⁷ See “ICC trustee meets with PSC to outline position and expectations for Vitelco,” The Virgin Islands Daily News, Nov. 20, 2007.

⁵⁸ See [http:// www.usac.org/hc/tools/disbursements/default.aspx](http://www.usac.org/hc/tools/disbursements/default.aspx). The data for 2005-2009 include High Cost Loop and Interstate Common Line Support components. The data for 2003 and 2004 include High Cost Loop, Interstate Common Line Support, and Long Term Support components.

⁵⁹ *Hearing Examiner Testimony*, Tr. at 16.

Federal funds were not misappropriated at some point during this period. As ICC informed the PSC, the “accounting system” at Vitelco was set up so that “money came in, and it all was swept up to ICC.”⁶⁰ This upstreaming of money from Vitelco to ICC apparently occurred on a daily basis until recently.⁶¹ Although the PSC sent an annual certification to the FCC saying that Vitelco was using USF funds for proper purposes, it is common knowledge in the U.S. Virgin Islands that the PSC provided that certification at Vitelco’s request without thoroughly verifying its accuracy.⁶²

D. Impact On This Transaction.

Despite the resounding silence of the Applicants, what Vitelco and others have described as the “looting” of ICC is directly relevant to the Consolidated Applications. CFC claims to be a qualified transferee even though its parent company failed to supervise adequately a loan of US\$500 million to ICC and Mr. Prosser. More significantly, the lack of competition and infrastructure diversity in the U.S. Virgin Islands was undoubtedly a direct contributor to the current network devastation that afflicts all Virgin Islanders. It is difficult to envision this scenario unfolding in an environment characterized by facilities-based inter-modal competition between the incumbent local exchange carrier and the cable television operator in the territory. The market conditions that caused the ICC meltdown, and deprived Virgin Islanders of anything

⁶⁰ See *Hearing Examiner Report* at 43 (Statement by Interim ICC CEO Clarke Garnett, Nov. 7, 2008); *Innovative Bankruptcy*, Complaint by Stan Springel against Jeffrey J. Prosser, et al. at 4, Adv. case 3:07-ap-03010, Oct. 19, 2007 (Doc. No. 169) (Trustee’s finding that ICC subsidiaries would “upstream funds” to ICC for Mr. Prosser’s personal use).

⁶¹ See “PSC Hearing Aims to Uncloud Vitelco Financial Picture,” *The Source*, Nov. 5, 2008 (Statement of PSC Attorney Boyd Sprehn).

⁶² See “Analysis: Court Document Confirms Source Reporting on Vitelco Subsidies,” *The Source*, April 19, 2009 (noting that the PSC every year “routinely rubber-stamped Prosser’s applications for these [USF] funds”). This article reports that Vitelco received \$15 million in USF funds to which it was not entitled by submitting inaccurate cost estimates to the FCC. See *Innovative Bankruptcy*, Trustee’s Objection to Jeffrey J. Prosser’s Emergency Motion, April 15, 2009, at 20.

resembling a modern network or true broadband services, are precisely what the Applicants are asking this Commission for permission to perpetuate on an ongoing basis.

V. THE CURRENT STATE OF COMPETITION IN THE U.S. VIRGIN ISLANDS

A. Highly-Concentrated Market.

Competition has never developed in the market for fixed communications services in the U.S. Virgin Islands. It is not hard to see why when the following ICC entities have all been under 100% common ownership (and it should be noted that ICC also owned the local daily newspaper with the largest circulation):

(i) Vitelco – the incumbent local exchange carrier in the U.S. Virgin Islands with a **100% market share** for local landline telecommunications services.⁶³

(ii) Innovative Cable – the only cable television operator in the U.S. Virgin Islands with an estimated **market share greater than 90%** for pay television services.⁶⁴

(iii) Innovative Long Distance – the largest provider of long distance (off-island) telephony in the U.S. Virgin Islands with an estimated **market share greater than 50%**; and

(iv) VI PowerNet – the largest provider of Internet access services in the U.S. Virgin Islands with an estimated **market share greater than 50%**.⁶⁵

Significantly, ICC has strategically operated Vitelco and Innovative Cable so that they do not compete against each other. In particular, ICC has operated Innovative Cable so that

⁶³ See *Local Telephone Competition: Status as of December 31, 2007*, Industry Analysis and Technology Division, Wireline Competition Bureau, Sept. 2008, at Table 13.

⁶⁴ The Applicants concede in their Consolidated Applications that Innovative Cable is the only terrestrial pay-television operator in the USVI. See Consolidated Applications, Exhibit 1 at 16.

⁶⁵ ATN has estimated the market share of these ICC companies based on Choice's participation in and knowledge of the telecommunications market in the U.S. Virgin Islands and other publicly available information. See *Haddow Declaration* in Attachment A. Because ICC is not publicly traded, precise data on its market share for each market sector are not readily available.

it does not provide local voice or data services in competition with Vitelco, and ICC has operated Vitelco so that it does not provide video services in competition with Innovative Cable. With this strategy, consumers in the U.S. Virgin Islands have been denied the benefits of inter-modal competition between the only local exchange carrier, on the one hand, and the only cable operator, on the other. As detailed in the preceding Section, the result is that Virgin Islanders pay high prices to Vitelco for poor service over a decrepit landline network that cannot support even the most rudimentary advanced services and applications. Put simply, ICC's domination of the fixed communications services market has prevented the U.S. Virgin Islands from joining the broadband age.

B. Barriers to Entry.

In addition to the high level of concentration in the market for fixed communications services, there are other high barriers to entry that have insulated Vitelco against competitive entry.

1. Geography and Demographics

The U.S. Virgin Islands is a tiny economy with a population of only 108,000 and a low per-capita income of US\$14,500. Because the territory is comprised of islands, there are no readily adjacent geographic markets to facilitate entry. Its mountainous terrain makes line-of-sight communications difficult for wireless providers, and certain entry costs, such as transporting equipment or ensuring the availability of skilled technical staff for installation and maintenance, are heightened by the distance from the U.S. Mainland. The rocky terrain makes it difficult and expensive to bury plant, yet the risks of installing and using outdoor plant are significant due to salt-based corrosion from the ocean as well as the hurricanes and other violent

weather that are endemic to the region. As a result, geography and demographics make the U.S. Virgin Islands a difficult market for new entrants even in the best of circumstances.

2. Economies of Scope and Scale

ICC enjoys economies of scope and scale that are difficult to surmount. While Choice and others have made concerted efforts for years to compete against ICC using fixed wireless technology, those efforts have achieved only modest results and have not materially diminished ICC's choke-hold on this market sector. In addition, ICC has a significant advantage over would-be competitors in being able to offer a bundled package of services. As its interim CEO noted, "Innovative has a consolidated service. Not many telecommunications companies offer telephone, cable television, internet and wireless on the same bill."⁶⁶

3. FCC Subsidies

As noted above, Vitelco receives several tens of millions of dollars annually in FCC subsidies. It would be difficult if not impossible for a new entrant to provide a directly competing facilities-based service in such a small market without a similar subsidy. However, even should a new entrant be designated as an eligible telecommunications carrier ("ETC"), current FCC policies severely limit its ability to obtain such subsidies.⁶⁷

4. EDC Benefits

Vitelco has received millions of dollars each year in the form of tax credits on its gross receipts, excise taxes, and property taxes, a 90% exemption from corporate income taxes, and a full exemption on withholding tax on dividends and interest, all granted by the Virgin

⁶⁶ See "Interim ICC Chief Expects New Owners in 2008," The Source, Feb. 1, 2008 (statement of Interim ICC CEO Clarke Garnett).

⁶⁷ See *High-Cost Universal Service Support*, WC Docket No. 05-337 and CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) (imposing interim emergency cap on high-cost support for competitive ETCs).

Islands Economic Development Commission (“EDC”). Vitelco continues to receive some or all of these benefits. The tax credits were first secured in 1995 when Vitelco promised it would employ a certain number of Virgin Islands residents and invest \$100 million in its capital infrastructure; the tax credits were renewed again effective in 2003 when it agreed to invest an additional \$75 million in the territory.⁶⁸ Vitelco failed to honor its investment and hiring commitments.⁶⁹ Vitelco has received approximately \$6.2 million each year since 2003 in tax credit subsidies, and approximately \$15 million in tax benefits each year prior to 2003.⁷⁰ As Vitelco’s own expert has recognized, EDC benefits are “simply a subsidy.”⁷¹ What is most disturbing is that Vitelco used this local government subsidy and has apparently commingled it with other ICC subsidiaries, including having Vitelco hire employees to do the work of other subsidiaries.⁷² Vitelco has a history of using government subsidies to subsidize not only its local exchange operations, but its other operations as well.

5. Vitelco’s Rural Telephone Company Exemption

Vitelco qualifies as a “rural telephone company” under the Act,⁷³ which means that Vitelco is exempt under section 251(f)⁷⁴ from the obligations imposed on incumbent local exchange carriers under section 251(c), including the requirement to provide unbundled network elements, collocation, and local exchange resale at cost-oriented rates.⁷⁵ Vitelco declined to

⁶⁸ See “Senators Probe Vitelco Tax Break Decision,” The Source, March 23, 2005.

⁶⁹ See “Senators Oppose EDC’s Settlement with Innovative,” The Source, October 25, 2004.

⁷⁰ See “Senators Probe Vitelco Tax Break Decision,” The Source, March 23, 2005.

⁷¹ See *Eisenach Testimony* (Attachment D) at 25.

⁷² See “Senators Probe Vitelco Tax Break Decision,” The Source, March 23, 2005; “Senators Oppose EDC’s Settlement with Innovative,” The Source, October 25, 2004.

⁷³ 47 U.S.C. § 153(37).

⁷⁴ 47 U.S.C. § 251(f).

⁷⁵ 47 U.S.C. § 251(c).

waive this exemption voluntarily, and the PSC refused to remove the exemption when petitioned to do so.⁷⁶ As a result, this potential avenue for entry into the fixed communications services market has been closed off.

6. An Underfunded PSC

The PSC has done nothing to promote competitive entry into the fixed communications services market in the U.S. Virgin Islands. In part, this may stem from the inability of such a small community to generate sufficient public funds to ensure that the PSC undertakes rigorous monitoring, regulatory and enforcement activities. Most major PSC proceedings have ended up being funded by Vitelco, with the predictable result that Vitelco's interests are favored over the interests of competitors.⁷⁷ Whether it is the PSC's decision (noted above) to permit Vitelco to retain its rural telephone company exemption, or the PSC's rejection of a competitor's request to require Vitelco to offer DS-3 services so that it does not have to purchase large numbers of individual DS-1 circuits,⁷⁸ the PSC has hindered rather than helped the efforts of competitors to establish a competitive foothold. Further, the multi-year "looting" of Vitelco by ICC's then-Chairman, Mr. Prosser, occurred under the nose of the PSC, prompting accusations in the local press that the PSC was "asleep at the switch."⁷⁹ In sum, there is no

⁷⁶ See Report of the Hearing Examiner, PSC Docket No. 526, May 22, 2001 (Recommendation of Hearing Examiner Frederick Watts that the PSC refuse to remove Vitelco's rural telephone company exemption). The PSC subsequently adopted this report.

⁷⁷ Pursuant to the PSC enabling statute, the primary entity being regulated in a particular proceeding funds the process.

⁷⁸ See Report and Recommendations of the Hearing Examiner, *In re Requests of Choice Communications, LLC*, PSC Docket No. 548, Oct. 21, 2003 (denying Choice's request for an order requiring Vitelco to offer DS-3 services). The PSC subsequently adopted the Hearing Examiner's report and recommendations.

⁷⁹ See "Prosser Creditors Face Half a Billion Loss," The Source, Feb. 10, 2009 (editorial asserting that "the regulators and law-enforcement officials were asleep at the switch).

reasonable basis to believe that the PSC will for the first time begin to take actions to promote fixed services competition in the U.S. Virgin Islands.

C. Summary.

ICC's domination of the fixed communications services market in the U.S. Virgin Islands is essentially impregnable. Based on the consistent experience of the past 20 years, ICC will continue to operate the only ubiquitous landline telecommunications network, as well as the only ubiquitous terrestrial pay-television network, in the U.S. Virgin Islands for the foreseeable future. Meaningful infrastructure investment and the offering of a full array of modern service options will not occur unless Vitelco and Innovative Cable compete aggressively against each other, and that will not occur unless they are independently owned and operated. The Commission has a unique opportunity to implement powerful and long-lasting changes in the lives of Virgin Islanders by conditioning its approval of these transactions upon full divestiture of Innovative Cable.

VI. THE FCC SHOULD REQUIRE CFC TO DIVEST INNOVATIVE CABLE AS A CONDITION OF GRANTING THE CONSOLIDATED APPLICATIONS.

Granting the Consolidated Applications will serve only to perpetuate the status quo in the territory such that all significant fixed network infrastructure will continue to be owned by one entity. As demonstrated above, the absence of competition in the fixed services market has had a disastrous impact on the U.S. Virgin Islands. Vitelco's existing fixed network infrastructure is antiquated and poorly maintained, while customers pay high prices for bad service. There are few service options and poor customer care.

A. Divestiture Will Promote Competition and Broadband Deployment

As mandated by Congress, the Commission's goal is to ensure that "every American citizen and every American business [has] access to robust broadband services."⁸⁰ The Commission has recognized that providing ubiquitous and affordable broadband services to rural America, while difficult, is critical to restoring economic growth and opportunity for Americans residing and working in rural areas, and thus will fundamentally benefit the nation's economy.⁸¹ The bankruptcy and resulting ownership change of ICC presents a unique opportunity, possibly the only one that will be available for many years to come, for the FCC to inject competitive vitality into the USVI fixed services market and accelerate the deployment of broadband infrastructure. The only option for decisive action that can achieve these objectives is to require separate ownership for Vitelco and Innovative Cable. As such, the Commission should condition its approval of the Consolidated Applications upon CFC's divestiture of Innovative Cable as a fully-functioning, stand-alone business.

This condition is necessary to ensure that the sale of the Group One assets to CFC serves the public interest. Separate ownership and operation of Vitelco and Innovative Cable will jump-start fixed services competition in the U.S. Virgin Islands. For the first time, Innovative Cable will have a strong incentive to offer VOIP, Internet access, data services, and other services in competition with Vitelco and VI PowerNet. Conversely, separate ownership would ensure that Vitelco has a strong incentive for the first time to offer terrestrial pay-television services in competition with Innovative Cable. Given Innovative Cable's existing

⁸⁰ *In the Matter of a National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, FCC 09-31, rel. April 8, 2009, at ¶ 5,

⁸¹ *See Bringing Broadband to Rural America: Report on a Rural Broadband Strategy*, Gen. Dk. 09-29, rel. May 22, 2009, at ¶¶ 7, 12, 16 [hereinafter "*Rural Broadband Report*"].

digital network, it should be a strong competitor from day one, and it will be the first significant fixed-line competitor that Vitelco has ever had.

The resulting increase in fixed services competition will spur the deployment of broadband facilities. The Commission has previously found, on the basis of case studies detailing advanced services deployment in various locations across the U.S., that the presence of additional competitors providing advanced telecommunications services in a community accelerates the deployment of advanced telecommunications capability in that community, increases the breadth and quality of available service offerings, and lowers prices.⁸² The Commission has recognized that “rural areas face particular challenges when it comes to the deployment of basic and advanced telecommunications services.”⁸³ Thus, requiring the separate ownership and operation of Vitelco and Innovative Cable will bring the benefits of broadband to Virgin Islanders and advance the implementation of the national broadband plan.

It is not sufficient to rely on the potential future development of market forces to promote competitive entry or broadband build-out in the U.S. Virgin Islands. The Commission recognized in the *Section 706 Second Report* that “market forces alone may not guarantee that some categories of Americans will receive timely access to advanced telecommunications capacity” and identified Americans living in U.S. territories as “particularly vulnerable to not

⁸² See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, 15 FCC Rcd. 20913, 21003-21004 (2000) [hereinafter “*Section 706 Second Report*”]. The Commission found that in both Waltham, Massachusetts (a suburb of 58,000 outside Boston) and Muscatine, Iowa (a town of 23,000), additional competitive providers began deploying advanced telecommunications capability once an initial provider had entered the market. *Id.*

⁸³ See *Embarq/CenturyTel Order* at ¶ 2.

having access to advanced services.”⁸⁴ Certainly market forces in the territory, left to their own devices, have not worked over two decades. Rather, they have led to massive mismanagement of the incumbent operators under the blind eye of a perennially under-funded PSC. Furthermore, the presence of competition in the mobile services market in the territory does not mitigate the total absence of competition in the fixed services market, as the Commission has established that these product markets are separate and distinct.⁸⁵ Particularly given the adverse impact of weather and terrain on wireless signal quality and network reliability in the U.S. Virgin Islands, mobile services cannot be considered a complete and adequate substitute for fixed services in any event.

Accordingly, the Commission should require CFC to divest Innovative Cable as a condition of its approval of the Consolidated Applications. In particular, the Commission should require CFC to divest all assets used today in the operation of Innovative Cable, including but not limited to all network equipment and other physical assets, licenses, permits, pole attachments, rights-of-way, franchise and other agreements, real property, intellectual property, software, employees, retail sites, customers, goodwill, and spectrum.⁸⁶ The divestiture should ensure that Innovative Cable is a fully-functioning, stand-alone business on day one. In accordance with prior precedent and to facilitate closing, CFC should be permitted to divest Innovative Cable to a trust, provided that the trustee is independent and can dispose of the assets

⁸⁴ *Section 706 Second Report* at 20918, 20992, 20996; *see also Rural Broadband Report* at ¶ 13.

⁸⁵ *See Sprint/Clearwire Order* at ¶ 33, where the FCC separately analyzed the proposed Sprint Nextel-Clearwire transaction for the potential for competitive harm in a combined market for mobile telephony/broadband services and in the fixed broadband services market.

⁸⁶ *See Verizon Wireless/ALLTEL Order* at ¶ 159; *WorldCom/MCI Order* at ¶¶ 151-152.

as he sees fit.⁸⁷ To accelerate the separation of the cable television operations from ICC's other properties, as well as the introduction of competition into the fixed services market, communications between the trustee and the Applicants should be limited to communications initiated by the trustee seeking information needed to operate and divest the businesses. Also, the trust should be limited to no more than six (6) months' duration.⁸⁸

B. Divestiture Is A Transaction-Specific Condition.

Requiring CFC to divest Innovative Cable as a condition of receiving approval of the Consolidated Applications is consistent with the FCC's practice of imposing only "transaction-specific" conditions in acting on transfer and assignment applications.⁸⁹ In this case, the transaction before the Commission is not merely the sale of the Group One assets to CFC. Rather, it is the entire interrelated series of decisions by which the ICC assets were packaged for sale by the Trustee as well as the auction process and the ultimate selection of CFC as the winning purchaser. To define the "transaction" under review as merely the last of these decisions – the selection of the winning purchaser – would have the effect of placing beyond the Commission's purview a series of choices that have profound consequences for key Commission policies regarding competition and broadband deployment. Not only did the Trustee fail to take

⁸⁷ See *Verizon Wireless/ALLTEL Order* at ¶ 163; *Applications of GTE Corporation, Vodafone AirTouch Plc, and Bell Atlantic Corp. for Consent to Transfer Control of or Assign Properties to a Divestiture Trust and For Temporary Waiver of the CMRS Spectrum Cap Rule*, Order, 15 FCC Rcd. 11608, ¶ 6 (2000) [hereinafter "*GTE/Bell Atlantic Divestiture Order*"]; 47 CFR § 20.6.

⁸⁸ See *Verizon Wireless/ALLTEL Order* at ¶ 166; *GTE/Bell Atlantic Divestiture Order* at ¶¶ 6, 8.

⁸⁹ See, e.g., *Embarq/CenturyTel Order* at ¶ 12; *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Time Warner Inc., and its Subsidiaries, Assignor/Transferor to Time Warner Cable Inc., and its Subsidiaries, Assignee/Transferee*, Memorandum Opinion and Order, 24 FCC Rcd. 879, ¶ 23 (2009); *Verizon Wireless/ALLTEL Order* at ¶ 180.

account of those policies in grouping the assets for purchase, the Trustee deliberately acted contrary to those policies in an effort to earn “maximum profits” for the sale of the assets.

In any event, the Commission’s past practice of imposing only transaction-specific conditions is a non-statutory practice which the Commission can set aside when the public interest so requires. ATN submits that the instant Consolidated Applications present such a situation.

VII. CONCLUSION

For these reasons, the Commission should deny the Consolidated Applications or, alternatively, grant the Consolidated Applications subject to the condition that CFC fully divests all cable television operations in the U.S. Virgin Islands.

Respectfully submitted,

ATLANTIC TELE-NETWORK, INC.

A handwritten signature in cursive script that reads "Robert J. Aamoth (jub)". The signature is written in dark ink and is positioned above a horizontal line.

Robert J. Aamoth

Henry T. Kelly

Joan M. Griffin

KELLEY DRYE & WARREN LLP

Washington Harbour, Suite 400

3050 K Street, NW

Washington, DC 20007-5108

(202) 342-8400

Attorneys for ATN

July 7, 2009

Certificate of Service

The undersigned certifies that on July 7, 2009, a copy of foregoing "Petition of Atlantic Tele-Network, Inc. to Deny or, Alternatively, to Grant With Conditions" was served on each of the individuals listed below via the means stated next to each person's name.

David Krech (via email to david.krech@fcc.gov) Policy Division International Bureau	Best Copy and Printing, Inc. (via email to FCC@bcpiweb.com)
Jodie May (via email to Jodie.may@fcc.gov) Competition Policy Division Wireline Competition Bureau	Byron Smyl (via first class mail) Representative of the Chapter 11 Trustee for the Estate of Innovative Communication Corporation P.O. Box 6100 Charlotte Amalie, Virgin Islands 00801
Kathy Harris (via email to Kathy.harris@fcc.gov) Mobility Division Wireless Telecommunications Bureau	Henry M. Rivera (via first class mail) Wiley Rein LLP 1776 K Street, N.W. Washington, D.C. 20006
Jeff Tobias (via email to jeff.tobias@fcc.gov) Mobility Division Wireless Telecommunications Bureau	Frank E. Vaughan (via first class mail) Assistant General Counsel National Rural Utilities Cooperative Finance Corporation 2201 Cooperative Way Herndon, Virginia 20171-3025
Linda Ray (via email to Linda.ray@fcc.gov) Broadband Division Wireless Telecommunications Bureau	Kent D. Bressie (via first class mail) Harris, Wiltshire & Grannis LLP 1200 18th Street, N.W., Suite 1200 Washington, D.C. 20036-2516
Wayne McKee (via email to wayne.mckee@fcc.gov) Engineering Division Media Bureau	Jim Bird (via email to jim.bird@fcc.gov) Office of General Counsel


Joan M. Griffin